

Before The
Federal Communications Commission
Washington D.C. 20554

ORIGINAL

In the Matter of)
)
Amendment of Parts 1,21 and 74 To Enable) MM Docket No. 97-217
Multipoint Distribution Service)
And Instructional Television Fixed) File No. RM-9060
Service Licensees to Engage in Fixed)
Two-Way Transmissions)

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COMMENTS

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK

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EXECUTIVE SUMMARY

Hispanic Information and Telecommunications Network, Inc. supports the proposed rule making with certain reservations regarding protection of the role of ITFS licencees in their relationships with wireless operators under a digital regime. Commenter particularly encourages the Commission to allow ITFS licensees flexibility in providing a broad range of telecommunications services to fully utilize two way digital capacity.

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To: The Commission

COMMENTS

Hispanic Information and Telecommunications Network, Inc., ("HITN" or "Commenter"), by its counsel, hereby submits its comments in the above-referenced proceeding in response to the Notice of Proposed Rulemaking (Notice) adopted October 7, 1997.

Introduction

HITN, the largest single national provider of Instructional Television Fixed Station ("ITFS") service, with channels in over 43 cities (and applications pending in another 45 locations) has enthusiastically embraced the potential of digital technology and shares with the Commission the belief that these amendments can enhance the range and depth of educational service which ITFS can offer to the public, especially through the capability to provide Internet access to schools, and through other two-way educational telecommunications services which may emerge. However, it remains concerned about the extent to which implementation of new technologies may shift the balance of power between ITFS licensees

and MDS operators. Commenter is pleased that the Commission has not adopted the proposed procedures, including the automatic grant of licenses, for the processing of applications in that this would have created a great burden for ITFS licensees.

In this proceeding, the Commission should reaffirm the importance of ITFS systems and the important role that ITFS licensees play in the provision of educational telecommunications services. Making clear the rights of ITFS licensees under ITFS lease agreements with MDS operators is the first step. Further, the time is ripe for the Commission to re-examine and modify the rather narrow definition of "educational programming" now included in the rules, and to expand that definition to include educational functions which may occur outside of accredited institutions and for credit courses.

As stated earlier in these proceedings, by this Commenter and others, the complexity of the proposed changes to the Rules is, to say the least, substantial. Commenter's limited resources prevent it from addressing every aspect of the proposed Rule changes which may have an impact on its operations. Silence as to particular provisions thus should not be equated with endorsement of those provisions. The Commenter regrets that it cannot offer more complete aid to the Commission in this important reconfiguration of this service.

Discussion

I. Regarding Certain Particular Provisions of the Proposed

Rules

1. At Paragraphs No. 13, 14, and 15, comment is solicited regarding the expanded definition of response stations, and the definition of a response station hub. Commenter suggests that it is of importance that proposed amendment of Sec. 74.901 of the Commission's Rules, setting forth definitions applicable to ITFS, be maintained in parallel to the relevant MDS definitions.

2. The question of interference standards is addressed in Paragraph No. 33, concerning the interference protection to be provided for the system configuration presented in the Petition. Commenter requests that the Commission consider carefully whether the reduced susceptibility of digital transmissions to interference may not allow a reduced interference factor, at least for co-channel uses. For example, if as a result of improved receive antenna design and digital data error correction technology the Commission concludes that a 28 dB co-channel interference standard adequately provides sufficient protection, it would serve the public interest to adopt 28 dB as a uniform standard.

II. The Commission Must Retain Its Authority To Review And Grant All Authorizations

3. While Commenter shares the hope and the belief that increased flexibility in this service, as proposed by the Petitioners, will serve the competitive position of the MDS industry and the educational goals of ITFS, it remains concerned that educational entities may lack internal expertise (or the funding to provide for outside expertise) for what may well be a constantly recurring need to evaluate the highly complex proposals and amendments which may be expected to be put forward. In this context, it is critical that the Commission retain the responsibility for determining if particular proposals are grantable. Therefore, Commenter strongly endorses the conclusion reached by the Commission, at Paragraph No. 53., that it should retain its role in this regard.

4. The limited resources available to Commenter and other ITFS entities should not be tied up evaluating the complex and frequently occurring applications that may be expected upon adoption of revised rules. The public interest will be better served if these resources can be applied to developing applications which serve the educational goals of these parties.

**III. The Commission Should Affirm the Important Role of ITFS
Systems in Fulfilling the Overall Educational Objectives of
Qualified ITFS Licensees**

5. The Commission created the ITFS service for the important purpose of making available spectrum for use by educational entities for the transmission of educational and instructional materials.¹ In this proceeding, the Commission should affirm the extremely important role that ITFS systems play in fulfilling the overall educational objectives of qualified ITFS licensees.

6. Under the Commission's new Universal Service Fund ("USF") program for schools and libraries,² a multi-billion dollar program being established to provide advanced telecommunications services to schools and libraries, ITFS licensees can and should play an important role in the fulfillment of the promise of this program. As a result of the service rules flexibility the Commission is proposing in this proceeding, many ITFS licensees will have access to funding under the USF program to construct technologically advanced two-way systems capable of handling their voice, video, Internet, and data needs. For example, HITN is currently proposing to construct an island-wide telecommunications services network in

¹ See Notice at para. 3.

² See In re Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, released May 8, 1997, at para. 425.

Puerto Rico which may potentially link hundreds of public and private schools over the same network. Without needed flexibility in the use of such systems, however, it will be difficult for ITFS licensees to serve the increasing educational telecommunications needs of educational institutions.

IV. ITFS Licensees Are Not Required to Provide Any Excess Capacity to MDS Operators on Their Systems

7. In the formulation of new rules with respect to the provision by ITFS and MDS licensees of two-way interactive services and other emerging technologies, the Commission must not lose sight of the basic consideration that it is the ITFS licensee who has the ultimate responsibility and control of its license. As the Commission recognizes in the NPRM, notwithstanding any short-term contractual obligations ITFS licensees may have with wireless cable operators regarding the leasing of excess channel capacity, it is the ITFS licensee's choice whether to lease any excess capacity to an MDS provider or any other entity.³ The rules currently do not require, and could not legally require, that ITFS licensees provide any of their channel capacity to MDS operators. By the same token, any rule changes now undertaken by the Commission must not have the *de facto* effect of requiring ITFS licensees to make additional

³ See Notice at paras. 78-87.

channel capacity available for non-ITFS use under existing lease agreements which were negotiated in contemplation of a very different channel capacity situation.

8. The typical existing lease agreements contemplate use by an MDS provider (for their provision of one-way wireless cable video programming services) of excess capacity on an analog ITFS system beyond the minimum 20 hours per week (plus optional recapture time) educational programming requirement of the ITFS licensee. Some recent agreements typically contemplate, in addition to the analog provisions, use of 75% of the digital capacity by the MDS operator (for the provision of one-way wireless cable video programming services) and 25% of the capacity by the ITFS licensee on a four (4) channel digital system.⁴ The intention of the parties in entering into these agreements has been to make excess capacity on the ITFS system available to the MDS operator for the limited provision of one-way wireless cable video programming services. The leases have been privately negotiated and therefore it should be left to the parties to determine whether to modify existing agreements to contemplate either any additional usage of excess ITFS capacity not expressly defined in the agreements or any additional services or channel digitization technologies permitted by the Commission at the conclusion of this proceeding. The Commission, however, should make

⁴ Where the contemplated system is less than 4 channels, HITN's agreements typically provide for one full channel for the ITFS licensee, or a 6 MHz contiguous block.

crystal clear that its rules were never intended to require, or have the effect of requiring, the leasing of excess capacity beyond specified minimum FCC mandated programming requirements. To the extent this may create ambiguities or questions under existing agreements, this should be left to the parties to resolve as contractual matters.

9. To clear up any misunderstandings with respect to the interaction between FCC Rules and the terms of the agreements, the Commission should clarify the following:

- (1) MDS operators have no right to utilize any additional ITFS capacity not clearly expressed in the subject lease agreement with an ITFS licensee; and
- (2) As existing excess capacity leasing has been authorized to stimulate the development of MDS, MDS capacity leased under an existing lease agreement may not be used for any purpose other than the delivery of one-way wireless cable video programming services, unless expressly provided for in the lease agreement.

10. To the extent the Commission deems it absolutely necessary to establish a minimum fixed amount of spectrum that ITFS licensees subject to either of the previously described lease agreements (or

similar type agreement) should be required to retain, the Commission must ensure that the affected ITFS licensee has the ability to reserve for its use at least a minimum contiguous six (6) MHz block of spectrum throughout the remaining lease term,⁵ irrespective of the number of channels licensed on the system, which it can use or lease for whatever purpose is permissible under the Commission Rules.

11. The Commission must not permit MDS licensees to receive what will be a sure windfall in access to use of valuable ITFS spectrum simply because they signed a vague lease agreement with an ITFS licensee for the purpose of their provision of one-way wireless cable video programming services. Unless specifically contemplated in the lease agreement, in no case should the Commission permit MDS operators currently using ITFS lease agreements to utilize ITFS spectrum for any use other than one-way wireless cable video programming services. MDS operators should be required to re-negotiate agreements with ITFS licensees if they desire to obtain either the use of additional capacity on an ITFS system or the use of ITFS frequencies for services other than one-way wireless cable video programming services.

V. The Commission Should Broadly Expand the Scope of Services ITFS Licensees May Provide to Fulfill ITFS Service Requirements and

⁵ Of course, at the termination of the lease period, the ITFS licensee recovers the full unencumbered usage of its originally licensed spectrum.

Permit National Service Providers Additional Service Flexibility

12. The Commission is extremely forward-looking in its desire to permit the use of ITFS frequencies for two-way interactive services, including voice, video, data, and Internet services, etc., and HITN fully supports this full license flexibility. However, in permitting this flexibility to determine how best to utilize the spectrum, the Commission should allow ITFS licensees the flexibility to satisfy fully their minimum "educational programming" requirements by expanding the definition to encompass any transmissions originated or controlled by the ITFS licensee which are used to further the educational objectives of the ITFS licensee, i.e., educational telecommunications services.

13. The Commission should provide even further licensing flexibility to national ITFS providers such as HITN. HITN currently provides a comprehensive educational programming package to educational institutions on a nationwide basis. HITN is able to do this because of the significant economies of scale produced by its national licensing of ITFS stations. As a result of its national coverage, HITN will be poised to offer a broad range of technologically advanced educational telecommunications services.

14. The needs of national providers, however, differ from those of the typical ITFS licensee. For example, while the typical ITFS licensee may only need a maximum 24 MHz of spectrum to

adequately provide its educational programming and other telecommunications services which the Commission is proposing in this proceeding, HITN may need substantial additional spectrum to satisfy the demand for technologically advanced services by educational institutions. The Commission should consider creating very streamlined methods for national providers like HITN to expand the capacity and geographic coverage of their systems to enable them to very quickly respond to market demands under the Commission's visionary new plan for the ITFS service, such as permitting greatly expanded recapture rights and providing greater flexibility with respect to the ability of ITFS licensees to obtain licenses for other FCC services which are complementary or necessary to the implementation of high technology ITFS provider services.

15. Further, the Commission should recognize that some ITFS providers will desire to offer a number of telecommunications services which are not educational services. Many ITFS providers are already providing such services beyond meeting their educational service requirements. For example, as the Commission is quite aware, George Mason University currently provides a commercial wireless cable service over ITFS frequencies that among other things, broadcasts Commission proceedings. These offerings allow ITFS licensees to generate additional revenues to subsidize their educational offerings, allowing ITFS licensees to be less reliant on leasing their spectrum to MDS operators.

16. This broad flexibility will allow ITFS licensees the ability to broadly expand use of their systems to satisfy a large range of telecommunications needs, further enhancing the Commission's goals with respect to advanced telecommunications services for educational institutions. It will also permit substantially more efficient use of limited and valuable spectrum resources, furthering important Commission spectrum policies. Last, by permitting ITFS licensees to use their systems in this manner, the Commission will help to advance the local competition goals outlined in the Telecommunications Act of 1996, as ITFS licensees will have an opportunity to provide competitive local telecommunications services.

VI. Educational Service Should Not Be Limited to Accredited Institutions

17. Commenter provides educational programming in Spanish and English serving the Hispanic population in markets across the United States and in Puerto Rico. From this perspective, Commenter has some appreciation of the educational and cultural needs which can be served by an ITFS provider. It is the strong belief of this Commenter that education can and does occur outside the confines of accredited institutions. The format may be distance learning, continuing education, ESL instruction, or refresher courses. In each

instance, the programming provided helps to advance learning. Therefore, Commenter urges that the Commission consider expanding its definition of educational service and incorporate a role for ITFS which serves these diverse populations.

18. Further, Commenter believes that the Commission can serve the public interest by recognizing that Internet access may be as educationally valuable as traditionally ITFS programming. While schools at all levels are moving toward fuller connection to the Internet, it should be recognized that this is a piecemeal process whereby some schools with more resources may have a connection in every room, and other schools may have only one or two connections available to the entire school. Even if it can be said that every school is connected, it hardly means that every student or every teacher has Internet access. HITN submits that if the Commission wishes to further the goal of providing meaningful Internet access to all schools, the reserving of the licensed spectrum to ITFS providers and equating access with educational programming will serve that goal. At a minimum, educational programming requirements should be, at least in substantial part, fulfilled by providing two way access.

19. Commenter would also suggest that the Commission reconsider the somewhat limited idea of "education" which now controls its definition of an educational entity. While Commenter appreciates the Commission's regard for accredited institutions,

and, conversely, the potential for charlatans to masquerade under the guise of an educational purpose to serve other ends, the question remains whether the current narrow definition fully comprehends the role that information exchange may achieve under the evolving information infrastructure. Many valid educational functions are achieved outside the context of accredited institutions. Surely the most profound goal of any true educational institution is to make "life long learners" of its students. The question is presented whether there is some way the Commission can lend its force to this goal. Commenter believes that there may be. That is, the Commission could further this end by recognizing that educational programming may be provided outside the institutional context.

20. Further, Commenter submits that the Commission should recognize that technology is creating new educational paradigms. In this context, continuing to limit the locations where recognized "educational" functions may occur to schools is counter productive to the goal full utilization of these technologies to benefit all levels of society. More and more, education is directed to the work place, for example, and more and more, the work place may well be the home. This function may have special importance as it serves the needs of those parties who are only reached through MDS system access. Commenter has in mind those individuals, who may include minority and financially depressed populations, who may not attend

“accredited institutions” but may have access to a signal carried over an MDS system and may wish to enhance their education. Disadvantaged populations occur as subscribers to such services in numbers disproportionate to their relationship to the total population, because these services provide affordable entertainment for those who lack the resources to frequent such outside the home diversions as first run movies and restaurants. Thus, where educational programming is carried over MDS channels, it may reach substantial numbers of such individuals.

VII. Minimum Programming Requirements Should be a Wholly Separate Issue from The ITFS Licensee's Right to Control and Responsibility Over 100% of its Licensed Spectrum

21. HITN would like to make clear that the question what should be an ITFS licensee's “minimum programming” requirements is wholly separate from any consideration of the ITFS licensee's right to complete control and responsibility over the spectrum it has been licensed. As explained above, the impact of vague leases (which allow MDS operators to use excess capacity on ITFS systems for the provision of one-way wireless cable video programming services) on the rights and responsibilities of ITFS licensee's to use their spectrum is an issue for private contractual negotiation.

22. What minimum programming requirements are established

should have nothing to do with how much of its own spectrum an ITFS licensee "can keep" for its own use. The simple and basic fact is that ITFS providers are licensed to control 100% of their spectrum, they have a public interest obligation to utilize that spectrum for educational purposes in accordance with the terms of their licenses. HITN has proposed that these educational purposes be greatly expanded, which will greatly broaden the scope of services which ITFS licensees can offer, i.e., educational telecommunications services, and in turn, generate substantial demand for ITFS provider services. If ITFS licensees have excess capacity available, certainly they should be able in their discretion to lease that capacity to other parties. However, the principle should not be reversed as a matter of regulatory policy to hold that whatever the ITFS licensee is not required to program as a minimum reverts to the MDS service.

23. Understanding that this issue is wholly separate from an ITFS providers rights over its spectrum, and in accordance with the proposed new definition of educational telecommunications services, HITN requests that the Commission develop a new requirement for the minimum amount of educational telecommunications services an ITFS licensee must provide before it can use its excess spectrum for other purposes. HITN recommends that ITFS licensees be permitted to satisfy these requirements by providing 20 hours per week of any

“educational telecommunications services” per 6 MHz block⁶ on their ITFS systems. After meeting the minimum requirements, ITFS licensees should be free to utilize their systems to engage in the provision of any other telecommunications services, or in their discretion lease excess capacity on their systems to other telecommunications providers, including MDS operators.

VIII. The Commission Must Ensure that Current ITFS Response Stations Continue to Be Associated with Current 6 MHz ITFS Licenses

Response stations are extremely important to an ITFS licensee's ability to effectively utilize its licensed frequencies to the fullest extent. HITN requests that the Commission take any measures necessary to ensure that all existing response stations pursuant to commission Rule Sec. 74.939(b) associated with ITFS licenses will continue to be licensed to, controlled by, and exclusively associated with those ITFS licenses pursuant to existing rules. Any new rule changes should have no effect on existing response stations or pending applications for response stations filed before the effective date of the new rules.


⁶ This would translate to reserving exclusively for non-commercial educational telecommunication services not less than 12.5% of the system capacity derived from each ITFS licensee

Conclusion

HITN respectfully requests that the Commission carefully consider the foregoing comments before making any determinations respecting the future of the ITFS industry.

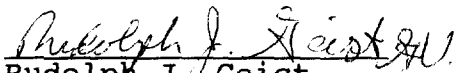
Respectfully submitted,

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